SUPREME COURT, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
*Appellants,*

v.

LEWIS R. SLATON, In his capacity as
District Attorney, Atlanta Judicial
Circuit, and HINSON McAULIFFE, In his
capacity as Solicitor General,
Criminal Court of Fulton County,
*Appellees.*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA

## APPELLANTS' BRIEF

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## APPELLANTS' BRIEF

## OPINIONS BELOW

The Opinions and Order of the various members of the statutory three-judge court sitting in the United States District Court for the Northern District of Georgia entered on February 22, 1973 are found at pages A.1 through A.17, inclusive, of the Jurisdictional Statement.

## JURISDICTION

The judgment of the three-judge district court (opinion by Judge Moye, with Judge O'Kelly specially concurring, Circuit Judge Morgan dissenting) was entered on February 22, 1973, denying the requested preliminary and permanent injunctive relief as to the constitutionality of the use of *Georgia Code Annotated* §§*26-2101* (Ga. L. 1968, pp. 1249, 1302; 1971, p. 344), *26-2103* (Ga. L. 1971, pp. 344, 345) and *26-2104* (Ga. L. 1971, pp. 344-345) as well as Georgia's nuisance statutes, *Title 72, Georgia Code of 1933,* as amended, and declaratory judgment as to their constitutionality as written and as applied or threatened to be applied against appellants herein.

The jurisdiction of this Court to review that decision is conferred by *Title 28 U.S.C. 1253,* there having been an Order denying injunctive relief in a civil action required by Congress to be heard by a district court of three judges. (*Title 28 U.S.C.* §§ *2281* and *2284.*)

On October 9, 1973, this Court noted probable jurisdiction.

## QUESTION PRESENTED

Whether the *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuels v. Mackell,* 401 U.S. 66 (1971) requirements for injunctive and declaratory relief were correctly applied by the majority of the Court in the context of First Amendment freedoms and prior restraint where there was at the time of the institution of federal suit a pending State civil proceeding and no jurisdictional threat existed regarding State criminal prosecution?

## STATUTORY PROVISIONS INVOLVED

The provisions of *Georgia Code Annotated* §§26-2101 through 26-2104 provide in pertinent part as follows:

*26-2101*

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section of the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall be for the first offense be punished as for a

misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302; 1971, p. 344.)

*26-2103*

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

(Acts 1971, pp. 344, 345.)

*26-2104*

Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband.

(Acts 1971, pp. 344, 345.)

*Chap. 72-1 CODE OF GEORGIA 1933, AS AMENDED, PROVIDES:*

72-101. (4457) **Definition in general.**—A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.

72-102. (4454) **Classes; public and private; definitions.**—Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.

72-103. (4454, 4455) **Right of action to individual for public nuisance.**—Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public do not

participate, such special damage shall give a right of action.

72-104. (4454, 4456) **Right of action to one injured in person or property.**—A private nuisance may injure either the person or property, or both, and in either case a right of action accrues to the person injured or damaged.

72-105. (4458) **Right of alienee of property injured. Liability of alienee of property causing nuisance.**—The alienee of a person owning the property injured may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case there must be a request to abate, before action brought.

*Chap. 72-2 ABATEMENT*

72-201. (5329) **Manner of abatement.**—Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the verdict of 12 freeholders of the same county, who shall be summoned, sworn, and impaneled for that purpose; which order shall be directed to and served by the sheriff of the county o; his deputy. (Acts 1833, Cobb, 817.)

72-202. (5330, 5338) **Public nuisance, how restrained.**—Private citizens may not generally interfere to have a public nuisance enjoined, but the petition must proceed for the public on information filed by the solicitor general of the circuit. A public nuisance may be abated on the application of any citizen specially injured. (50 Ga. 451; 76 Ga. 806.)

72-203. (5338) **Private nuisance; application by person injured for abatement.**—A private nuisance may be abated on the application of the person injured. (76 Ga. 806.)

72-204. (4459) **Injunction where consequences irreparable in damages.**—Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages, and such consequences are not merely possible, but to a reasonable degree certain, equity may interfere to arrest a nuisance before it is completed.

## *Chap. 72-3. HOUSES OF PROSTITUTION.*

72-301. **Houses and contents declared a nuisance.**– Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or prostitution shall be guilty of maintaining a nuisance, and the building, structure, or place, and the ground itself in or upon which such lewdness, assignation, or prostitution shall be conducted, permitted, or carried on, continued, or shall exist, and the furniture, fixtures, musical instruments, and other contents of such building or structure are also declared to be a nuisance, and may be enjoined and abated as hereinafter provided. (Acts 1917 p. 178.)

72-302. **Action to enjoin nuisance, how and by whom brought; temporary injunction.**– Whenever a nuisance is kept, maintained, or exists, as defined in the preceding section, the solicitor general or any citizen of the county may maintain an action in the name of the State upon the relation of such solicitor general or citizen to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building upon which such nuisance exists. In such action, the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, order a temporary injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, or oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which the evidence shall be presented, that such nuisance does in fact exist. (Acts 1917, p. 178.)

72-303. **Notice of hearing on application.**– Three days' notice in writing shall be given the defendant of the hearing of the application and, if then continued at his instance, the temporary injunction as prayed shall be granted as a matter of course. (Acts 1917, p. 179.)

72-304. **Injunction binding throughout judicial district. Contempt.**– When an injunction shall have been granted it

shall be binding on the defendant throughout the judicial circuit in which it was issued, and any violation of the provisions of the injunction shall be a contempt of court as hereinafter provided. (Acts 1917, p. 178.)

72-305. **Trial; time; evidence of reputation of place.**— The action shall be triable as other cases in equity and at the first term of the court. In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of such nuisance. (Acts 1917, p. 179.)

72-306. **Dismissal of complaint. When solicitor or citizen may be substituted for complaining party.**— If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement by the complainant and his attorney setting forth the reasons why the action should be dismissed, and the dismissal approved by the solicitor general in writing or in open court. If the court shall be of the opinion that the action ought not to be dismissed, he may direct the solicitor general to prosecute said action to judgment, and if the action shall be continued more than one term of court, any citizen of the county or the solicitor general may be substituted for the complaining party and prosecute said action to judgment. (Acts 1917, p. 179.)

72-307. **Costs, to whom taxed.**— If the action shall be brought by a citizen and the court shall find that there was no reasonable ground or cause for said action, the cost may be taxed to such citizen. (Acts 1917, p. 179.)

72-308. **Violation of injunction; punishment for contempt; proceedings.**— In case of the violation of any injunction granted under the provisions of this Chapter the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt shall be punished as for contempt in the discretion of the judge. (Acts 1917, p. 179.)

72-309. **Abatement, order of; contempt of court; fees for removing and selling property.**– If the existence of the nuisance shall be established in an action as provided in this Chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or other movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution: Provided, that if it shall appear to the judge that the furniture and chattels are owned by others than the inmates of said house, he may order the effectual closing of the building or place against its use for any purpose, and keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, structure, or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed a reasonable sum shall be allowed by the court. (Acts 1917, p. 180).

72-310. **Proceeds of sales.**– The proceeds of the sale of the personal property, as provided in the preceding sections, shall be applied in payment of the cost of the action and abatement, and the balance, if any, shall be paid to the defendant. (Acts 1917, p. 180.)

72-311. **Bond to abate; release of property.**– If the owner shall appear and pay all cost of the proceedings, and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceedings be an action in equity, and

said bond be given and cost therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment lien, penalty or liability to which it may be subject by law. (Acts 1917, p. 180.)

72-312. **Permanent injunction; money judgment; lien.**– Whenever a permanent injunction issues against any person for maintaining a nuisance as herein described, or against any owner of the building knowingly kept or used for the purposes prohibited by this Chapter, the judge granting said injunction shall, at the same time, enter up judgment against the person, firm or corporation owning said building in the sum of $300, and said judgment shall be a special lien upon the premises, and the furniture and fixtures therein, complained of, and shall as against said property rank from date with all other judgments or liens as now provided for by law. Said judgment shall issue in the name of the State, and be enforced as other judgments in this State: Provided, that the lien of the judgment herein provided for upon said property, real and personal, used for the purpose of maintaining said nuisance, shall not relieve the person or building from any of the other penalties provided by law. All sums arising from the enforcement of the judgments in this section referred to shall be paid into the treasury of the county in which said judgment is rendered and become part of the general funds of said county. (Acts 1917, p. 181.)

*Chap. 72-4. NUISANCES IN CITIES.*

72-401. (5331) **Manner of abatement; jurisdiction of police court.**– If a nuisance complained of shall exist in a town or city under the government of a mayor, intendant, aldermen, wardens, or a common council or commissioners, such nuisance, by and with the advice of said aldermen, wardens, council, or commissioners, may be abated and removed by order of said mayor, intendant, or commissioners; but if the nuisance complained of shall exist in a city having a population of 20,000 or more, the police court of such city,

whether known as mayor's or recorder's court or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and, if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or the marshal of said town or city, or his deputy. (Act 1833, Cobb, 817, Acts 1892, p. 64.)

72-402. (5332) **Notice of meeting to determine question of abatement.**– Reasonable notice shall be given to the parties interested of the time and place of the meeting of such mayor, intendant, aldermen, wardens, council, or commissioners. (Act 1833, Cobb, 817.)

*Chap. 72-99. CRIMES.*

72-9901. (681 P.C.) **What nuisances are indictable.**– Any person who shall erect or continue after notice to abate, a nuisance which tends to annoy the community, to injure the health of the citizens in general, or to corrupt the public morals, shall be guilty of a misdemeanor. (Act 1833, Cobb, 817.)

## STATEMENT

On August 21, 1972, Appellees instituted an action in the Superior Court of Fulton County, Georgia, seeking to obtain temporary and permanent injunctions against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., Atlanta, Georgia, by any person and an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed. A Rule Nisi was issued requiring Appellants to show cause before his Honor, Judge Claude D. Shaw, at 9:30 a.m. on August 25, 1972, then and there to be heard, why the prayers of the complaint should not be granted.

On the date set for hearing a removal action was filed in the United States District Court for the Northern District of Georgia thereby divesting the Fulton Superior Court of jurisdiction. Subsequently, Appellants filed the instant complaint for preliminary and permanent injunctions against the further use of Ga. Code Ann. §§26-2101 (Ga.L. 1968, pp. 1249, 1302; 1971, p. 344), 26-2103 (Ga.L. 1971, pp. 344, 345) and 26-2104 (Ga.L. 1971, pp. 344-345) as well as Georgia's Nuisance statutes, Title 72, Georgia Code of 1933, as amended, and declaratory judgments as to their unconstitutionality as written and as applied or threatened to be applied against Appellants. The requisite three-judge court was requested pursuant to 28 U.S.C. §§2281 and 2284.

The single District Judge to whom the case was referred stayed his ruling on the Appellees' motion to remand in the removal action pending a decision by the three-judge panel.

The Appellees sought to utilize a Georgia statute, Ga. Code Ann. §26-2103, which declared that the use of any premises in violation of any of the provisions of Chapter 26-21 of the Criminal Code of Georgia shall constitute a public nuisance. Chapter 26-21 is the portion of the Georgia Code dealing with the distribution of obscene materials. Georgia Code Ann. §26-2104 was also invoked by Appellees. That section declares that any materials declared to be obscene by the provisions of Chapter 26-21 and advertisements for such materials are contraband.

The statutory provisions of Ga. Code Ann. §26-2101 were attacked by Appellants as being unconstitutional on vagueness and overbreadth grounds. *Miller v. California*, ____ U.S. ____; 37 L.Ed.2d. 419 (1973).

Georgia Code Ann. §26-2103 and Title 72 of the Georgia Code of 1933 as amended, were challenged as being unconstitutional as written and as applied because they authorize a prior restraint on materials which are presumptively protected under the First Amendment of a kind condemned by the Supreme Court in an unbroken line of cases beginning with *Near v. Minnesota,* 283 U.S. 697 (1931) and continuing through *New York Times Co. v. United States,* 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) and others. Georgia Code Ann. §26-2103 was also attacked as denying due process and equal protection in that the statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance. This labelling of a business as a public nuisance on the basis of a single isolated transaction was also attacked as creating an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States,* 395 U.S. 1532. It was further attacked as denying Fifth and Fourteenth Amendment rights to have every element making up a nuisance to be proven by competent evidence, in a First Amendment context, beyond a reasonable doubt.

The state court action was brought by the District Attorney of the Atlanta Judicial Circuit pursuant to authority granted him in Title 72, Georgia Code of 1933 to institute proceedings to abate a continuing public nuisance. The Solicitor of the Criminal Court of Fulton County joined the state court action as a plaintiff and is an Appellee herein even though no statutory or other authority exists for the Solicitor to act for the public to abate a nuisance.

The Harem Book Store, operated by Appellant Speight on premises leased to Appellant Chandler, is located at 2979 Campbellton Road, S.W., Atlanta, Georgia, on property zoned C-2 commercial; a classification which includes a retail bookstore. The Harem Book Store is engaged in the sale and offering for sale of books, magazines, newspapers, movie films, and other materials which are presumptively protected under the First Amendment to the Constitution of the United States, pursuant to applicable City of Atlanta business licenses.

The publications offered for sale by the Harem Book Store are comparable to those declared not to be obscene by the Supreme Court and many inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the First Amendment to the United States Constitution. No sales or offerings are made to persons under eighteen years of age (minor) of any of the adult-type publications or materials distributed by the Harem Book Store, nor are they "pandered" in the Ginzburg-sense, nor are the materials sold in such a way that unwilling persons cannot avoid them. (See *Miller v. California,* 37 L.Ed. 2d at page 427.)

No persons have been convicted for distributing obscene materials upon the premises of the Harem Book Store. The trial of one employee on such charges resulted in a mistrial when the jury was unable to reach a verdict. No publication sold or offered for sale at the Harem Book Store has been adjudicated obscene, either as of the time of the Opinion and Order of Court on February 22, 1973, or now.

At the hearing on Appellants' Motion for a Preliminary and Permanent Injunction several publications which had been purchased by adult agents of the Solicitor's office were tendered into evidence and were ruled inadmissible. Some of these were those upon which a conviction could not be obtained in the earlier criminal prosecution.

The three-judge panel produced three opinions. The two District Judges rules that the propriety of federal intervention in these circumstances has been decided by the Fifth Circuit Court of Appeals in *Paliao v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and therefore, since the state court action was not brought in bad faith[1] or for purposes of harassment and Appellants did not present any "special circumstances which would justify federal intervention," the complaint must be dismissed. The concurring opinion of District Judge O'Kelley stated that, in order for the federal court to intervene, there must be no adequate remedy or appellate process in the state courts.

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[1] Bad faith was alleged by Appellants and facts supporting that allegation were presented. Paragraphs 18 through 20 of the Complaint read as follows:

"18.

Defendants knew or should have known that no violation of Georgia statutes, to-wit: Georgia Code §26-2101, has been

Circuit Judge Morgan dissented, having found the statutes herein involved susceptible to no saving construction and

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(Footnote 1 Continued)

alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint attached hereto and identified as Exhibit 'A'.

"Further, Plaintiffs, affirm that in a criminal prosecution charging Plaintiff James L. Chandler, brought in the Criminal Court of Fulton County, by the agents, servants, and employees of Defendant McAuliffe charging violation of State of Georgia Obscenity law, after a trial of three (3) days, a mistrial was declared by the Honorable Daniel Duke, Judge, because the jury was unable to reach a unanimous verdict. (The jury remained in deadlock at four (4) to one (1) in favor of acquittal.)

"19.

The resort to utilization of the concept of public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and destruction of all the press materials contemporaneously being offered for sale at said store, without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> 'Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture.' (Exhibit "A", p. 3)

and rejecting the "civil proceeding used to enforce criminal laws" rationale of *Palaio v. McAuliffe*, supra.

The majority of the three-judge court finding that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases, as interpreted by the Fifth Circuit in *Palaio v. McAuliffe, supra*, required non-intervention, the injunction was denied, the action was dismissed and this appeal follows.

## SUMMARY OF ARGUMENT

This Court for more than forty years has instructed the judiciary both state and federal that it is not possible to safeguard the precious *First Amendment* rights by permitting injunctive restraints upon the free exercise thereof utiliziing overbroad statutes including nuisance statutes, *Near v. Minnesota*, 283 U.S. 697 (1931) as well as enjoining future dissemination. As so aptly put by Mr. Chief Justice Hughes, *283 U.S. 697* at 713, "This is the essence of censorship."

There are extensive parallels in *Near* and the case presently before the Court. Both were subject of a civil nuisance statute enforceable by injunction and contempt proceedings permitting prior suppression of future dissemination. Also both were subjected to preliminary injunctive sanctions.

With this clear mandate, followed from that time forward in multiple decisions, we find a state Court operating under a strikingly similar statute invoking the remedies found to be so abhorrent in *Near*.

The Complaint filed in the within proceedings demonstrates to the Court the potential of irreparable injury

necessary to invoke the jurisdiction of the federal forum to litigate federal constitutional rights. However, the majority of the statutory three-judge court found that the principles of *Younger v. Harris,* supra and *Samuels v. Mackell,* supra, mitigated against that court in going beyond the question of jurisdiction to decide the substative legal issues involved.

*Younger v. Harris* seems to say that in criminal cases no injunctive relief can be granted by a federal court interfering in a State criminal proceeding unless there are circumstances present which dictate irreparable injury to the parties or circumstances which indicate bad faith enforcement of the law and/or harassment by State authorities.

The court did not reach the question in *Younger* as to whether the same rationale would apply to State court civil proceedings instituted prior to the attempt by a party to invoke jurisdiction of the federal forum, or under what circumstances the federal forum may intervene to enjoin State court civil proceedings and whether those proceedings are governed by the same requirements of *Younger v. Harris.*

This case presents the potential for this Court to enter into a resolution of those questions and problems.

## ARGUMENT

This Court is now considering the following question in *Steffel v. Thompson,* No. 72-5581:

> "Did the Court below correctly apply the *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuels v. Mackell,* 401 U.S. 66 (1971) standards to deny petitioner *declaratory relief* in a situation which did not involve a pending State criminal prosecution?"

This case was argued before the Court on November 13, 1973 and according to published reports the questioning of the Court related to whether or not the principles of *Samuels v. Mackell*, 401 U.S. 66 (1971) bar declaratory judgment intervention when no prosecution is pending and the attack is on a statute "as applied." Mr. Justice White also raised the question that if that were so, would there not also be a case or controversy problem which may bar declaratory relief.

The question presented in the case at bar relates to whether or not the *Younger v. Harris*, supra and *Samuels v. Mackell*, supra requirements apply to deny petitioners *injunctive and declaratory relief* in a situation which did not involve a pending State criminal prosecution.

Thus, this case presents, as *Steffel v. Thompson* did not present, the factor of injunctive relief with regard to the unconstitutionality of the State statute both as written and as applied. Circuit Judge Morgan in his dissenting opinion beginning at p. A. 7 of the Jurisdictional Statement, sets forth his evaluation of the statute and its patent unconstitutionality.

Hence, as stated before, the case at bar involves two factors not present in *Steffel v. Thompson:*

(1) In this case injunctive relief was sought, whereas in *Steffel* declaratory relief was sought;

(2) The statute is challenged as unconstitutional both as written and as applied, whereas in *Steffel* it was only challenged as applied.

Thus, we contend that the decision of this Court in the case of *Steffel v. Thompson* may not adequately answer the question posed by counsel.

This case raises important issues regarding whether a showing of irreparable injury or other extraordinary circumstances is required in order for a federal court to grant injunctive and declaratory relief in cases which involve a pending state civil proceeding but do not pose a threat to state criminal prosecutions. This question was not expressly decided by *Younger v. Harris, supra*, which itself dealt with a criminal case. Mr. Justice Black wrote,

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. 41.

The concurring opinion of Mr. Justice Steward in *Younger v. Harris*, 401 U.S. at 55, in which Mr. Justice Harlan joined, makes clear the limited nature of the holding in that case:

> "... [s]ince all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."

However, the majority of the three-judge court in the case at bar, while recognizing explicitly the fact that *Younger v. Harris*, supra, and its companion cases did not decide the issue, felt bound by *Palaio v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and the following language therein:

> "We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be

governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement–by whatever means–of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

"We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws.*" (Emphasis supplied.)

1. *Palaio v. McAuliffe, supra,* is incorrect in its reasoning and its holding, and, in any event, is not applicable to the present case. In that case, the Solicitor General of the Criminal Court of Fulton County, Georgia, instituted proceedings in the Fulton County Superior Court to have two named motion pictures declared obscene and subject to seizure. Shortly before the date set for the state court hearing Palaio and others filed complaints in federal district court seeking injunctions against pending and future criminal and civil proceedings against them and a declaration that the procedures employed in the state court suit were constitutionally invalid. On March 17, 1971, after the state judge had found probable cause for declaring one of the motion picture films obscene and after the state criminal prosecution of the appellants in *Palaio v. McAuliffe, supra,* had begun, the federal district judge concluded that the suit to declare the motion pictures subject to seizure was a good-faith effort by Georgia officials to enforce Georgia criminal laws, and accordingly held that dismissal was dictated by *Younger v. Harris, supra.*

By the time the appeal reached the Circuit Court of Appeals the criminal prosecution was pending and the Fulton Superior Court had been affirmed by the Supreme Court of Georgia on October 7, 1971, in *1024 Peachtree Corp. v. Slaton,* 228 Ga. 102, 184 S.E.2d 144.

The Circuit Court of Appeals agreed with the characterization by the Supreme Court of Georgia of the suit to declare the film subject to seizure as a part of Georgia's program of enforcing its criminal laws. It pointed out that a three-judge federal court has suggested such suits might afford a method of obtaining the constitutionally required adversary hearing prior to the arrest and prosecution of one for the sale of allegedly obscene materials. *Gable v. Jenkins,* N.D. Ga. 1969, 309 F.Supp. 998, aff'd. per curiam, 397 U.S. 592 (1970). This ignores the compulsory self-incrimination aspects of such a proceeding which forces one to furnish a film to the court as the beginning of a prosecution for exhibiting that same film.

The Circuit Court of Appeals also relied upon language by the Supreme Court in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 437 (1957) recognizing that such civil suits "supplement the existing conventional criminal provisions dealing with pornography." However, the quoted portion did not refer to "such civil suits." Instead, it referred to §22-a of the New York Code of Criminal Procedure (L. 1941, C. 925), as amended in 1954 (L. 1954, C. 702). Section 22-a of the New York Code of Criminal Procedure was upheld because it had procedural safeguards. The Georgia procedure has none.

In a case similar to this one, decided after *Younger v. Harris,* supra, and its companions, this Court ruled that 42

U.S.C. §1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. §2283, *Mitchum v. Foster*, 407 U.S. 225 (1972). The dissent of Chief Justice Burger, in which Justices White and Blackman joined, urged the district court on remand to consider

> "whether general notions of equity or principles of federalism similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

The majority of the three-judge court cited the above language but it is doubtful that the majority of this Court in *Mitchum* could have reached the 42 U.S.C. §1983 issue, after its earlier ruling in *Younger*, had the majority not thought intervention might be appropriate in a case such as this involving prior restraint if the Anti-Injunction statute did not present an absolute bar.

As pointed out by Circuit Judge Morgan, in his dissent, civil proceedings result in the loss of certain protections which are available in a criminal proceeding. Among these are trial by jury and proof beyond a reasonable doubt, to name but two.

Assuming, *arguendo*, that the "civil as basically an enforcement of criminal law" theory of *Palaio, supra*, is correct, that is not the case here. While all the materials proffered by the state into evidence are or have at one time been the basis of criminal prosecutions against individuals, the disposition of the instant case will not, in the words of *Palaio, supra*, "significantly affect a state's enforcement – by whatever means – of its criminal laws." 466 F.2d 1230 at

1233. The pending criminal prosecutions will remain pending no matter what the disposition of this case. Thus the instant case cannot be characterized as civil enforcement of criminal laws. Appellee's complaint requested the following:

> "(a) . . . injunctions, both temporary and permanent, against the conduct and operation of the Harem Bookstore . . . by any person; and
>
> "b" . . . an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed."

That this is an impermissible prior restraint of constitutionally protected materials is obvious and will be discussed hereinafter. Here, however, its inclusion is to show that what is being sought here is qualitatively and substantively different from what took place in *Palaio, supra,* and, *Palaio* is not controlling.

2. The decision of the three-judge district court is in conflict with the decision of this Court in *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972) in which it was held that abstention was not required by *Younger v. Harris, supra,* and its progeny in an action for injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided, *inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. at 502. The three-judge court involved there held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court found a constitutionally relevant justifiable controversy but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate because the state court could settle the question of a correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated.

To reach that decision this Court was compelled to consider the implications of *Younger v. Harris* and *Samuels v. Mackell*. Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a case in which there was no criminal prosecution which was to be enjoined:

> In *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), this Court, held that, apart from 'extraordinary circumstances,' a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal aystem that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (separate opinion)." 406 U.S. 498, at _____

The separate opinion referred to is that of Mr. Justice Brennan himself. Since this Court has held that the stringent *Younger v. Harris* and *Samuels v. Mackell* tests do not apply in a suit prior to or not involving criminal prosecutions then the decision of the District Court in this case conflicts with *Lake Carriers Assoc. v. MacMullan, supra.*

3. The decision appealed from is in conflict with the principles enunciated by this Court in *Gibson v. Berryhill*, ___ U.S.___, 36 L.Ed.2d 488 (1973). In that case, Berryhill and others were licensed optometrists employed by Lee Optical Co. and were not members of the Alabama Optometric Association because membership therein was limited to optometrists practicing privately. They were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (board) all members of which were Association members. Two days thereafter the Board brought its own suit in state court against the optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry. The action before the Board was stayed pending the outcome of the state court action. The charges against the individual defendants were dismissed but the state trial court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. The Board, in the meantime, revived the Association's charges against Berryhill and the other appellees, who sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The District Court enjoined the Board proceedings but thereafter the State's highest court reversed the state trial court and held that the optometry law did not prohibit a lecensed optometrist from working for a corporation. Thereafter, the Board appealed to the Supreme Court. This Court held that neither the rule of *Younger v. Harris*, 401 U.S. 37 or principles of comity required the District Courts to dismiss the suit in view of the pending Board proceedings. The reasoning that compelled the conclusion that intervention was proper despite the pending actions is applicable here.

This Court unanimously held that a predicate for a *Younger v. Harris* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issued involved." 41 L.W. 4580. A competent tribunal was not present in *Gibson v. Berryhill* because the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it. 41 L.W. 4581.

The remaining predicate for a *Younger v. Harris* dismissal – the opportunity to raise and *have timely decided* the federal issues involved – is not present.

Under Georgia law injunction cases are exempt from the automatic supersedeas provisions of §8 of the Appellate Practice Act of 1965. The burden rests upon the appellant to obtain such order, pursuant to §62(c) of the Civil Practice Act (Georgia Code Ann. §81A-162(c)) to obtain such order as will protect his rights and preserve the status quo during the pendency of the appeal. *Howard v. Smith*, 226 Ga. 850 (1970). The provision of the Civil Practice Act referred to above provides, in pertinent part, that when an appeal is taken from an interlocutory or final judgment granting an injunction, the court in its discretion may suspend the injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. §81A-162(c) This procedure in cases involving the application of the First Amendment and a prohibited prior restraint is contrary to the holdings of this Court in *Freedman v. Maryland*, 380 U.S. 51, *Blount v. Rizzi*, 400 U.S. 410; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, among others.

This means that a prior restraint either in the form of a bond "or otherwise" or closure of the bookstore pending appeal is expressly authorized by Georgia law pending an

appeal. Equally obvious is the potentially prohibitive cost of an appeal and the resulting tendency to self-censorship lest an entire business be lost because one volume of a book or one issue of a magazine may trigger nuisance abatement proceedings. *Cf. Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

Because of the above facts irreparable harm would be present in letting the state court adjudicate the issues involved in the instant case as surely as it was present in *Gibson v. Berryhill, supra,* in which the tribunal was incompetent because of bias.

4. The decision of the three-judge district court is in conflict with the result of the decision of a three-judge court in the Western Division of the United States District Court for the Northern District of Ohio in *Pursue, Ltd. v. Huffman,* _____ F. Supp. _____ No. C 72-432, decided April 20, 1973. In that case a suit was brought under 42 U.S.C. §1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§3767.01, et seq., as it pertains to the exhibition of obscene movies. Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint seeking a temporary and permanent injunction closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of applicable statutes. After a hearing on Huffman's motion for a temporary injunction the Court entered an order closing the theatre for an indefinite period. A complaint was filed in the district court and the district court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

Thereafter, Huffman applied for a hearing for the purpose of conducting a prior adversary hearing on films not yet reviewed and to consider his application for a permanent injunction against the theatre. The Court ordered the theater closed for one year unless released by order of the Court pursuant to compliance by the owners of the theater with certain statutory requirements.

Pursue, Litd., as successor in interest of the original leaseholder, filed a complaint in the district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the state court judgment and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. Without even discussing the issues of abstention or comity the three-judge court asserted jurisdiction and held the Ohio statute to be an impermissible prior restraint on First Amendment rights and therefore unconstitutional. Obviously, as did Circuit Judge Morgan in the instant case, that panel had no difficulty in finding irreparable harm in the closing of the place of business.

The *Pursue, Ltd.* case is not unknown to this Court, in that the following has occurred with respect to said case:

A. On or about May 23, 1973 Petitioners Huffman and Fair filed the following documents in this Court:

(i) Motion for Leave to File Petition for Writ of Mandamus or Prohibition, Petition for Writ of Mandamus or Prohibition, and Brief in Support Thereof; Docket No. 72-1613 Misc.

(ii) Motion to Advance Date Set for Filing of Briefs in Opposition to Petition;

(iii) Application to Honorable Potter Stewart for Stay Order or Writ of Injunction.

B. On June 12, 1973, Petitioners' Application for Stay, No. A-1199, presented to Mr. Justice Stewart, was denied.

C. On June 25, 1973 this Court entered the following order in the instant matter:

> "The application for stay or writ of injunction presented to Mr. Justice Stewart and by him referred to the Court and the motion to advance are denied. The motion of Pursue, Ltd., to participate as a party respondent is granted."

D. On or about July 5, 1973 James J. Clancy, Attorney for Petitioners applied to the Court for an extension of time (No. A-53, Re: *Huffman, et al v. Pursue, LTD*) in which to docket an appeal from the opinion and order of April 20, 1973.

E. On July 9, 1973 Mr. Justice White signed an order extending the time for docketing an appeal to and including August 14, 1973.

F. On or about August 14, 1973 a Jurisdictional Statement was filed in this Court appealing the Opinion and Order of the statutory three-judge court on April 20, 1973, docketed as *Huffman et al v. Pursue, LTD* No. 73-296 on this Court's calendar which Jurisdictional Statement is for the most part identical in substance to the Petition for Writ of Mandamus or Prohibition.

G. On September 17, 1973 Pursue, LTD, Respondent herein, filed a Motion to Dismiss or Affirm, and no action has been taken by the Court in No. 73-296.

H. On or about October 23,, 1973, *Pursue, Ltd.* as respondent filed a Response in Opposition to Petition for Writ of Mandamus or Prohibition in case No. 72-1613 Miscallaneous.

I. On or about November 12, 1973 this Court denied the Petition for Writ of Mandamus or Prohibition in No. 72-1613.

5. There is no remedy available to Appellants in the state courts of Georgia. The majority opinion points out that "plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia state courts." This is true. It is also true that the decisions of the Supreme Court of Georgia have already approved the use of the public nuisance approach to the regulation of "obscene" materials. In *Evans Theatre Corporation v. Slaton,* 227 Ga. 377 (1971) the Supreme Court of Georgia held that

> "the State has an interest in the welfare, peace and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws." 227 Ga. 377 at 382.

The decision in *Evans Theatre Corporation v. Slaton, supra,* was prior to the passage of the legislation relied upon by the Appellees who admitted at oral argument that the challenged Code section was drafted with reliance upon that case. There

is no reason to believe that the Supreme Court of Georgia will not authorize under a statute what it approved in the absence of one. See also *Walters v. Slaton* 227 Ga. 676 (1971).

6. The substantive issue involved on the merits is of paramount importance and its resolution is necessary by this Court in view of the place occupied by the Free Speech and Press provisions of the First Amendment in a democracy. Moreover, the closing of a bookstore under the guise of abating a public nuisance is a constitutionally impermissible prior restraint and violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Appellees Slaton and McAuliffe, in their Complaint to close the Harem Book Store as a public nuisance, made it quite clear that they do not seek merely the cessation of what they view as illegal activity on the premises (i.e., the possession, for sale, of obscene materials), but have asked for temporary and permanent injunctions against the further operation of the Harem Book Store.

It has been well recognized by this Court that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant,* 367 U.S. 717, 731 (1961).

> "The *First Amendment* requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line ... Our insistence that regulations of obscenity serupulously embody the most vigorous procedural safeguards ... is ... but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks ...'. *Bantam Books v. Sullivan,* 372 U.S. 58, 66 (1963)." *Blount v. Rizzi,* 400 U.S. 410, 416, 417 (1971).

See also: *Heller v. New York*, ____ U.S. ____, 37 L.Ed.2d 745 and *Roaden v. Kentucky*, ____ U.S. ____, 37 L.Ed.2d 757.

Moreover, this Court has made it clear that since

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Appellees Slaton and McAuliffe, under their planned use of the nuisance concept, do not plan to separate protected from unprotected speech; they merely seek to prevent all kinds of speech, at the Harem Book Store, by closing its doors forever by labelling it a public nuisance.

As did the system condemned in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this method of obscenity regulation conveniently makes recourse to the criminal process unnecessary.

"Any prior restraint on expression comes to [the Supreme Court] with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

In considering the validity of an injunction forbidding the distribution of "any literature" by the petitioners, the Supreme Court, in *Organization for a Better Austin v. Keefe*, noted that

> "in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

The only difference between that case and the instant case is that the population of Atlanta and Fulton County is several times that of the City of Westchester, Illinois, the one referred to above and hence, a far greater number of people will be deprived of access to materials which are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

The proposed injunction, it should be noted, does not enjoin the sale or distribution of specific materials shared as "obscene" instead, by closing the store, it enjoins the sale of any press materials whether obscene or otherwise. The Court of Appeals for the Fourth Circuit has recently recognized that

> "the Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature. *United States v. Congress of Industrial Organization*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948)." *United States v. Crowthers*, 456 F.2d 1074, 1080.

The Court went on to hold that to abridge activities protected by the *First Amendment*,

> "the government must have a compelling interest to justify the abridgment and the scope of the abridgment must not be greater than reasonably necessary to serve the government's purpose. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)." *United States v. Crowthers, supra*, at 1080.

The idea advanced above, sometimes referred to as the "less drastic means" doctrine, requires that

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Fifth Circuit has noted that in the area of *First Amendment* freedoms,

> "the overbreadth doctrine plays an important role, for it requires the legislature to focus narrowly on the particular evils it wishes to combat when speech is at stake," *Hobbs v. Thompson*, 448 F.2d 456, 470 (1971).

In *Roth v. United States*, 354 U.S. 476, 488 (1957), the decision upholding the right to regulate obscenity, it was said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being

> of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The cases cited above make clear that the blunderbuss approach to the regulation of obscenity represented by declaring the premises or the store to be a nuisance (even assuming valid, final convictions for violation of obscenity statutes thereon in the past) cannot be made to conform to the standards of the *First, Fifth* and *Fourteenth Amendments.* First, there is an adequate remedy at law for violations which have occurred in the past, *i.e.*, the criminal penalty. Second, declaring the business to be a nuisance does not comport with the less drastic means test because it completely prevents the dissemination of even protected materials. Third, a lesser measure, an injunction against the dissemination of "obscene" materials, would operate as a prior restraint, would induce self-censorship, and would not give such notice as to what conduct was prohibited as to be enforceable. In addition, it would place the bookseller in the position of having to prove that he was not violating the injunction by proving the offending material is, in fact, protected. This is, of course, also contrary to established doctrine that the burden of proof is upon the censor. *Speiser v. Randall,* 357 U.S. 513 (1958). Fourth, there are no safeguards by which a judicial decision as

to whether the materials are, in fact, protected will be forthcoming within any stated period of time, thus ensuring a restraint of only such duration as is necessary for sound judicial resolution of the issues. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Blount v. Rizzi*, 400 U.S. 410 (1971).

The decision of the Supreme Court of the United States in *Near v. Minnesota*, 283 U.S. 697 (1931), makes very clear the vice of the Appellees proposed procedure against Appellants wherein it states, at page 713:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

The same judgment, that the operation and effect is "the essence of censorship", is appropriate here.

In a later portion of the opinion, the Court answered the argument that the statute dealt not with publication *per se*, but with the business:

> "In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constituional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." *Near v. Minnesota, supra,* at 720.

In 1962, the Supreme Court had before it the case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. That case concerned the proper construction of *18 U.S.C.* §*1461* and its application to the nude male magazines involved therein. The concurring opinion at 370 U.S. 503, 504 of Mr. Justice Brennan, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, dealt with the possible constructions of the statute, which dealt with regulation of obscenity through the mails:

"There are two possible constructions of §*1461* on the basis of this brief Senate discussion. One possibility is that short of breaking seals, the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution – and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending §*1461*, and enacting a second banning material with obscene matter on its face and – unlike §*1461* – explicitly providing that it 'shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.'

"The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson – who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped – would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct construction of the 1865 enactment. But at least *it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity (see Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 2d 1357, 51 S.Ct. 625;*

*Summerfield v. Sunshine Book Co., 95 App.D.C. 169, 221 F.2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter."* (Emphasis supplied.)

This reasoning compels the conclusion that not only may materials not be proscribed which have not been judicially found obscene, but also that even assuming that a valid conviction has been obtained as a result of the sale of obscene material at a given location, it is not constitutionally permissible to put a blanket prohibition on further sales of any materials.

The validity of the reasoning and approach of the Supreme Court in *Near* is more apparent now than ever before. The Appellants herein who have not ever proven violations of the law arising out of the business of the subject bookstore are engaged, purely and simply, in attempted censorship and suppression of materials which they cannot establish are unlawful, but which they personally find offensive. This Court, charged as it is with the duty of preventing erosions of those fundamental freedoms which set this country apart from all others, should not countenance such tactics.

Case law involving the suppression or attempted suppression of allegedly obscene materials on nuisance grounds is scant and not uniformly consistent. Nevertheless, the better reasoned opinions prohibit the kind of relief sought by the Appellees in their action.

A recent case, and one directly in point on the merits, is *Pursue, Ltd. v. Huffman,* ____ F. Supp. ____ (No. C72-432, U.S.D.C.N.D. Ohio, decided April 20, 1973), discussed above. In that action a permanent injunction was issued against the enforcement of a state court order closing an Ohio theatre as a nuisance pursuant to an Ohio statute. The decision held that the statute and its application to the theatre constituted an overly broad prior restraint upon First Amendment rights.

In another case out of the U.S. District Court for the Western District of Tennessee, Western Division, entitled AIRWAYS THEATRE, INC. and SOUTHLAND THEATRES, INC., Plaintiffs, v. PHILIP M. CANALE, District Attorney General, DAVID M. PACK, Attorney General of Tennessee and WINFIELD DUNN, Governor of the State of Tennessee, Civil C-73-262, filed November 19, 1973, the court held that Tennessee's nuisance statute was unconstitutional. The statute was held to be unconstitutional by this unanimous three-judge panel for at least two reasons; one of which related to the definition of places of nuisance, which could be applied to include one's home and secondly, that

> "seizures of press materials, fixtures, furnishings and equipment and stock used in or in connection with the maintaining or conducting of a nuisance, shall be subject to seizure immediately upon detection by any law enforcement officer ... thus, once there is a determination of obscenity by a law enforcement officer, seizure of the property may take place."

The three-judge court held that the procedure flew in the face of the decision of the U.S. Supreme Court in *Roaden v. Kentucky, supra.*

Several state courts have reached the same conclusion. In *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967), the Supreme Court of Tennessee construed a statute under which the District Attorney General of the Sixth Judicial District of Tennessee sought a temporary injunction enjoining the Defendants from showing or disposing of a film entitled "London Night Life" or other such film, or acquiring such other films. A permanent injunction was prayed for, after a hearing, and a determination the films complained of were obscene.

After a hearing, the Trial Court found certain named films to be obscene and decreed, at 892:

> "It is, therefore, ordered, adjudged and decreed, pursuant to the authority in Tennessee Code Annotated, Section 39-3005 (c) that the defendants, New Rivieria Art Theatre of Chattanooga, Inc., and H. W. Hill, be permanently enjoined from the further or future showing of the films and 'Coming Attractions' or 'Trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of Tennessee Code Annotated, Section 39-3007."

The Appellants insisted first, that the statute in question did not authorize the granting of an injunction, temporary or permanent, enjoining the showing of any and all films by the parties sought to be enjoined. The Court agreed, stating that the statute comprehended injunctions only against obscene material and added, at 412 S.W. 2d 893, 894, the following:

"The granting of a temporary injunction prohibiting the defendants from showing any film had the effect of closing the theatre and was an unconstitutional application of the statute in violation of defendants' constitutional rights of freedom of speech and due process."

The Appellants also complained about the permanent injunction prohibiting defendants from showing other films and coming attractions or trailers of the sort, kind or type which may be classified by the Courts as obscene material.

The Court agreed:

"The statute does not authorize an injunction to restrain the acquisition and display of unidentified films, coming attractions or trailers which a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.

"Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material."

"The burden is on the District Attorney General to show the material sought to be enjoined from sale or display is unprotected by the first amendment to the constitution of the United States. *Freedman v. State of Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

> "We agree this portion of the decree is obviously in violation of the first, fifth and fourteenth amendments to the Federal Constitution. *Kingsley Books, Inc. v. Brown, supra.*" *New Rivieria Art Theatre v. State, supra,* at 895.

The Supreme Court of Florida, in *Mitchum v. Florida ex rel Schaub,* 250 So.2d 883 (1971), had occasion to consider a Trial Court's permanent injunction which was worded as follows:

> "ORDERED AND ADJUDGED that the Respondents cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 847.011 . . . "

The Court condemned this order succintly and directly:

> "The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. *Speiser v. Randall,* 357 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon hisfreedom to vend publications. Cf. *Smith v. California,* 361 U.S. 147 (1959); *Freedman v. State of Maryland,* 380 U.S. 51 (1965). See, *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967)."

The Florida Court went on to note that a permanent injunction, reading as follows, had been entered by the Trial Court:

> "ORDERED AND ADJUDGED that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Sarasota, Florida, by said respondents constitutes the maintaining of a public nuisance and Matthew Rocks and Bob Mitchum are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people."

This, too, was found to be unacceptable.

> "This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931)."

The Florida Court also pointed out that the procedure utilized by the State of Florida to condemn the entire contents of the bookstore was deficient. Three exhibits had been presented to the Trial Court and were used to condemn the entire contents of the bookstore on the theory that they were "representative".

The Court rejected this approach:

> "Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence." *Mitchum v. Florida ex re. Schaub, supra.*

In rejecting the contention that one publication might be used to judge others not in evidence, the Court relied upon the Supreme Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In that case, Missouri procedures for suppressing alleged obscenity were found to lack the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. The Court discussed the reliance by the Missouri Supreme Court on the Supreme Court's decision in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and found such reliance to be misplaced:

> "The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between 'a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene,' *Kingsley Books, supra* (354 U.S. at 437), and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all 'obscene'

material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

At this point, Footnote 28 was referred to and it cites the refusal of the Trial Court in *Kingsley Books, supra,* to allow the Defendants therein to do as the Appellees wish to do in their proceeding against Harem Book Store:

"28. The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: '[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.' 208 Misc. 150, 168, 169, 142 NYS 2d 735, 751. Cf. *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 51 S.Ct. 625." *Marcus v. Search Warrant, supra,* at 735.

Thereafter, the Court pointed out other differences between the procedure in *Kingsley Books, Inc. v. Brown, supra,* and the Missouri procedure which are also relevant to the Georgia procedure:

"*Third, Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that

> New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U.S. at 443, note 2. But there is no doubt that an effective restraint – indeed the most effective restraint possible – was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." *Marcus v. Search Warrant, supra,* at 735, 7356.

More recent cases have been consistent with the theory espoused by Appellees herein. In *State of Indiana ex rel Thomas J. Blee v. Mohney Enterprises, et al.*, 289 N.E. 2d 519 (Court of Appeals of Indiana), Petition to Transfer to the Supreme Court of Indiana denied May 14, 1973, the approach of Appellees Slaton and McAuliffe herein was rejected by the highest Courts of Indiana. In that case Blee had sought to enjoin the operation of an adult bookstore, operated by Mohney, as a nuisance. The trial court found for Mohney and Blee, on behalf of the State of Indiana, appealed.

Blee had contended that an Indiana statute deeming any building or place used for the purpose of lewdness, assignation or prostitution a nuisance applied to the operation of a retail bookstore selling allegedly obscene materials. He also had alleged that such operation constitutes a public nuisance enjoinable by a private citizen under I.C. 1971, 34-1-52-1; Ind. Ann. Stat. §2-505 (Burns 1967) which reads:

> "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the

> comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Blee introduced into evidence several exhibits consisting of materials he and others had purchased at the bookstore. The Court, as had the trial court, did not pass on the contention that these materials were obscene.

The Court pointed out that what Blee sought to enjoin "is the dissemination by an adult bookstore, of *any* printed materials whatsoever, in Allen County" and that he did not seek to prohibit only the dissemination of specific, identifiable items.

The Court stated that any discussion of the issues tendered by Blee must be preceded by a determination whether such injunctive relief would be violation of the First Amendment to the Constitution of the United States.

After quoting *Roth v. United States*, 354 U.S. 476 (1957) and *Redrup v. New York*, 386 U.S. 767 (1967), the Court stated:

> "None of the above standards is broad enough to prohibit dissemination of materials which have not yet been printed.
>
> This decision must rest upon the firmly established principle reiterated in *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, that an "injunction, so far as it imposes prior restraint on First Amendment rights." [And it is impermissible where it] operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature of 'any kind' . . . "

The requested injunctiom would be an impermissible prior restraint and the trial court's denial thereof was proper. We therefore do not reach appellant's other contentions.

Judgment affirmed."

Nor may the Defendantss herein be heard to say that the relief that they feel themselves entitled to in the suit sought to be enjoined herein is any different in substance from that described above. They seek,, not a determination that certain named publications are obsscene in the constitutional sense, but instead, they make demands for:

"1. Summons and an appropriate order for service of summons issued, and of all rules and orders.

2. For an interlocutory injunction:

(a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person.

(b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed.

3. That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted."

The conclusion is inescapable that Appellees Slaton and McAuliffe are engaged in a concerted action to impose a total and complete prior restraint upon the dissemination of *any* publications or materials by the Harem Book Store without regard to its effect upon protected speech and the rights of the citizens of Georgia and of the United States to purchase materials presumed to be protected by the *First Amendment.*

The United States Supreme Court in the case of *Paris Adult Theatre I v. Slaton, et al,* ____ U.S. ____, 37 L.Ed.2d 446 held that a procedure which sought to condemn as obscene a single named film comported with constitutional requirements as the same procedure was applied in that case provided, the Court said, that the definition of obscene was not otherwise void for vagueness (the so-called *Roth-Memoirs* test) and incorporated by authoritative judicial construction or legislative enactment the standards set forth in *Miller v. California,* supra. In fact, at page 455, including footnote 4, the majority of the Court suggests that his procedure is emanately fair when undertaken in the context therein prior to the institution of any criminal proceedings, and that the procedure would be even more fair if the disseminator had an opportunity to question the obscenity of the materials in a declaratory judgment forum prior to dissemination. The language of the decision and the footnote makes it clear that the Court was examining the Georgia procedure as it related to the prohibition of a specific film and/or films, and not to a general total and complete restraint on all films, whether first determined to be obscene or not.

In fact, this Court suggests that all press materials are presumptively protected until there is a judicial determination of obscenity in the opinion of the majority in *Roaden v. Kentucky,* supra at p. 764-765. In this case we are dealing

with a Georgia statute which authorizes, independent of any criminal proceeding, the closing of a bookstore or theatre as a public nuisance. If such is allowed to occur, then those who disseminate and exhibit adult materials would have to engage in the kind of "self-censorship" that would result in a "chilling of speech" that would ultimately have the effect of depriving adults of our society from access to non-obscene books which deal candidly with the subject of sex – a mysterious and powerful force in society.

Thus, we think the special circumstances exist that justify this Court confining the principles of *Younger v. Harris*, supra and *Samuels v. Mackell*, supra to the specific holdings in those cases, and this Court should not permit the doctrine to be extended to encompass the category of proceedings which relate to State imposition of civil sanctions to defeat the jurisdiction of the federal forum to litigate federal constitutional rights.

The procedures sought to be utilized by Appellees herein are being utilized to close a bookstore without regard to its contents and thereby prevent further dissemination at that location of any publication to anybody, by any person.

Clearly, this impermissible prior restraint justifies relief in a federal forum when sought by a proper party. *Zwickler v. Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967).

An amusing comment on this Younger problem was addressed by Judge Aldersit, concurring in *Roy v. Jones*, CA-3 (8/28, 1973) 42 LW 2158, wherein he stated as follows:

> "The fundamental equitable concepts of *Younger* must never be subordinated. Thus, one piece of the *Younger* factual complex must not become the

subject of controlling emphasis to the exclusion of the important legal principles constituting the rationale of the case. An example of this is the suggestion that the root premises of *Younger* do not lie where there is no on-going State proceeding. While the contempor-enity [sic] of the State action may indeed be extremely important, this is but one factor and this one factor must not be considered in vacuo ... if the presence of an on-going State proceeding is critical, so is the necessity of proving entitlement to an immediate injunction. So understood, there is a delightful 'Catch-22' quality about it all:

"Plaintiff: Aha, you can't apply *Younger* because there is no on-going State proceeding ...

"Defendant: Aha to you Sir; if there is no on-going State proceeding then why do you need an injunction? What's there to enjoin? ..."

## CONCLUSION

The three-judge district court was incorrect in applying the *Younger v. Harris* and *Samuels v. Mackell* considerations to the Appellants' Complaint and Petition for Injunctive and Declaratory Relief because there was no criminal prosecution involved. The reliance upon *Palaio v. McAuliffe* was misplaced as that decision's "civil as basically enforcement of a criminal statute" rationale is clearly erroneous. Even assuming that the comity considerations do apply the threat of the closing of a bookstore provides the necessary special circumstances and irreparable injury to support injunctive and declaratory relief against the enforcement of statutes authorizing an impermissible prior restraint upon the distribution of materials conceded to be entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

This Court should reverse the dismissal of Appellants' action and direct the three-judge district court to proceed to a hearing on the merits.

Respectfully submitted,

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